A Discussion Paper

ON ENVIRONMENTAL LAW ENFORCEMENT IN NOVA SCOTIA

Nova Scotia
Department of the Environment

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Minister

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Minister's Message

A Gallup poll released in late June highlighted the fact that despite recent awareness of environmental issues, Canadians are not satisfied with efforts undertaken to ensure a clean environment.

In the last two years the government has introduced significant legislation concerning the environment. Perhaps the legislation that has received the most public attention is the Environmental Assessment Act. Other legislation pertains to recycling, litter abatement, protection of the ozone layer, and the establishment of the Nova Scotia Youth Conservation Corps.

Nova Scotians have now joined Canadians in general in demanding tougher enforcement of environmental law and greater penalties for polluters.

This discussion paper entitled "Environmental Law Enforcement" outlines innovative principles in this direction, including: polluter pays, extended environmental responsibility to all parties, victim compensation, and cost recovery. Make no mistake about it. The changes put forward in this area, when implemented, will profoundly affect the way we do business, how we earn a living, and the way we conduct our day-to-day affairs. Everyone has a self-interest in being part of this consultation.

This discussion paper is being distributed throughout the province to all interested members of the public for your views and insights.

I encourage all Nova Scotians to participate in this consultation process. We welcome any comments or suggestions in writing or we encourage you to call our 1-800-565-6633 phone line and record your views on our special phone.

These comments and suggestions will be considered when preparing new legislation, which we hope to introduce in the fall session of the legislature.

I look forward to your contribution to this process and I thank you for helping us ensure the integrity of our environment is maintained for future generations of Nova Scotians.

Honourable John G. Leefe
Minister of the Environment

I. INTRODUCTION

The Government of Nova Scotia is committed to the protection, improvement, and sustainable use of our environment. Primary steps to realize these goals will require intergovernmental cooperation and dedication of resources to an effective law enforcement system. Over the next few months, the government intends to introduce changes to environmental law enforcement legislation in Nova Scotia. The purpose of these changes is to strengthen environmental law enforcement effectively and to extend enforcement capabilities by providing stronger penalties, more sweeping powers, and more effective mechanisms for combating environmental offences. The overall impact is fundamentally to change the way in which environmental laws are applied in this province.

This discussion paper was developed to assist in the public consultation process by:

- presenting an overview of environmental enforcement issues of concern to us and other governments in Canada and to show how other jurisdictions have addressed these issues;
- providing an opportunity for the public to comment on enforcement legislation issues and on changes that must be made to ensure effective enforcement of environmental law in this province.

Public comments will be used to help formulate new enforcement legislation, which is proposed for introduction into the Legislature as early as this year.

The last section of this discussion paper contains a questionnaire that deals specifically with enforcement issues. Concerned individuals who want to record their views and provide comments or suggestions on enforcement change are asked to phone in their responses to this questionnaire by calling toll-free (1-800-565-6633). Others who wish to express written comments are also encouraged to do so by mailing letters to Nova Scotia Department of the Environment, Media and Public Relations Section, P.O. Box 2107, Halifax, N.S. B3J 3B7.

Nova Scotia Department of the Environment has initiated an advertising campaign in provincial daily and weekly newspapers to announce this consultation process. The Department has also distributed copies of this discussion paper throughout the province to interested members of the public. Additional copies are available from the Nova Scotia Government Bookstore, 1700 Granville St., Halifax (1-424-7580) or from Nova Scotia Department of the Environment, Media and Public Relations Section (424-5300). It is the desire of the Government of Nova Scotia to have Nova Scotians participate in a consultation process that will lead to the development of an effective environmental enforcement system.

II. BACKGROUND

Since 1973, when Nova Scotia Department of the Environment was established, environmental values and concerns have changed dramatically. Greater pressures on the environment have made environmental problems and their resolution increasingly complex.

Environmental policies must now reflect a proactive approach to environmental issues. Legislation must extend beyond traditional monitoring and pollution control to actions that enhance, anticipate, and prevent adverse environmental impacts and sustain the use of natural resources.

Effective management requires decision-making bodies to understand fully the interrelated nature of issues, to consider the consequences of human impacts on the environment, and to recognize the need for concerted action. But if we are to realize our goals to enhance and preserve our natural resources, legislation and policies alone are not enough. Efficient implementation of legislation requires an effective enforcement system, which includes incentives to change as well as penalties to deter environmental offences.

Since 1986, the number of acts that Nova Scotia Department of the Environment administers has increased from 3 to 13 with 29 sets of regulations. They were introduced to allow government to deal more effectively with management aspects of a broader range of environmental issues, including ozone layer depletion, recycling and litter abatement, dangerous goods and hazardous-wastes management, environmental impact assessment, pest control products, and derelict vehicles removal.

These new acts and regulations contain various tools and processes to allow government to administer the acts competently through, for example, approvals processes, ministerial orders, penalties, inspections and monitoring requirements, loans and grants programs, and emergency response systems. A number of enforcement issues however have not been fully addressed. The government is in the process of reviewing environmental law enforcement in other provinces with the intent of adopting those principles and practices best suited to our own province. Before proceeding with the development a new enforcement act however, the government is asking for your comments and advice on various enforcement practices.

III. REFLECTING ENVIRONMENTAL PRINCIPLES IN LEGISLATION

The following discussion focuses on nine environmental principles that have shaped the development of environmental enforcement legislation and practice. These are:

1. **Shared responsibility**
2. **Liability**
3. **Polluter pays**
4. **Enforcement capability**
5. **Legislative and regulatory action**
6. **Compensation and cost recovery**
7. **Intergovernmental cooperation**
8. **Policy into law**
9. **Sustainable development**

1. Shared Responsibility

The next 10 years mark a crucial period in environmental history. Now known as the "turn-around decade," it is during this short time frame that we must begin significantly to reverse the impacts that we have had on natural resources and the environment.

The realization of such a task will require commitment, collective action, and sharing of the responsibility by all members of society — government, industry and the public — in the environmental protection, enhancement, and wise use of environmental resources.

Recent enforcement legislation introduced by other provinces has established a number of areas of responsibility such as the following:

- individuals who cause the release of dangerous goods, hazardous wastes, pesticides, or contaminants into the environment must report these incidents to the environmental authorities;
- individuals responsible for these products must take reasonable measures to contain the spill, must take action to restore the site of the spill, and must bear the cost of cleanup;
- individuals must assist investigators where necessary;
- members of enforcement agencies must report spills they discover;
- municipalities, cities, and towns must also play a responsible role in environmental law enforcement.

2. Liability

Responsible Parties

Environmental laws contain clauses that describe to whom the law applies, definitions of terms, chargeable offences, legal processes, and penalties. Their purpose is to ensure that individuals "responsible" for an offence can be appropriately charged under the law. Many provinces have broadened the definition of who can be charged or who is responsible for an offence ("responsible party") to ensure that these parties are liable for environmental damages and clean-up costs. Under new definitions "responsible parties" may now include: present and past landowners, occupiers, tenants, receivers, trustees, generators and carriers of wastes, or all who have gained from failing to abide by environmental standards.

Chargeable Offences

Numerous provinces have greatly expanded their powers to lay charges by defining new offences chargeable under the law. For example, it is an offence in other provinces for:

- an individual to make false or misleading claims relating to pollution;
- industries and businesses to operate outside the confines of licences, permits, and operating manuals. This provision enables government to lay charges whenever conditions of a licence or permit are broken without first having to prove pollution or damage to land, air, or water resources.

Directors' Liability

Other provinces have introduced a directors' liability clause, which allows the directors of companies who participate in an offence to be charged. This charge can be laid whether or not the company is charged. If convicted, the director may face a jail term, a fine, and/or a number of other court-imposed penalties.

Employers' Liability

Other provinces have introduced an employers' liability clause, which makes it possible to charge an employer for actions of employees. Although the employee may also be charged, this measure is intended to reinforce the responsiblity of upper management, making it no longer acceptable to blame poor maintenance, overlooked discharge, or pollutants on employee action.

3. Polluters Pay

One of the most important concepts of environmental management is the polluters pay principle, which requires those responsible for environmental pollution or damage to pay the costs and expenses for damages, environmental cleanup, and rehabilitation.

A number of provinces have enacted measures to ensure that polluters incur the costs for environmental damages. As examples, the legislation may:

- require a permit or license holder for a project to deposit security (e.g., performance bond, insurance, government bond, cash, cheques, irrevocable letters of credit) before a project can proceed. This security would be used to rehabilitate sites if the project is abandoned, if pollution occurs, or if the permit or licence holder is unable or unwilling to pay;
- order the polluter to compensate the government for the costs of investigation (e.g., costs of laboratory analysis, expert opinions, court costs, emergency measures, environmental cleanup, and preventative action);
- order polluters to pay compensation to an individual for loss or damages to property as the result of an environmental offence;
- provide compensation immediately to an injured party at the same time as a conviction is handed down;
- polluters may be ordered by the courts to compensate the government for the cost of remedial or preventative action taken when ministerial orders are ignored.

4. Enforcement Capability

There are a variety of mechanisms by which provincial governments can expand their capability, authority, and power to enforce environmental laws. These methods involve:

Delegating Enforcement Responsibility and Extending Enforcement Powers

Several provinces have expanded their administrative and enforcement capability by delegating to department staff, other government employees, and municipalities the authority to issue certain licences and permits. Other provinces have also designated members of other provincial departments, federal departments, or municipal police forces to act as environmental inspectors, investigators, or enforcement officers. These individuals have the power to search business premises, order testing procedures, take statements, and to assist in environmental prosecutions.

Extending Authority to Issue Ministerial Orders

The ability to issue a ministerial control or stop order exists under several environmental statutes. In emergency situations it is crucial that inspectors on the scene be able to issue such orders. Recent legislation introduced by other provinces allows designated staff members to issue a ministerial order, a power that previously was held by the minister alone. Coupled with this, proper appeal procedures have been set for parties affected.

Amending/Revoking Existing Approvals

Many permits granted by the provincial environment department in the past were given "in perpetuity" and with few, if any, conditions attached. Provinces have introduced legislation to permit the environment department to review and renegotiate some of these approvals when the minister, on reasonable and probable grounds, considers the earlier approval to be a detriment to the public, to constitute a hazard to health or safety, or to impair the quality of the environment for other uses.

Providing Informer Protection

It is essential, in efforts to ensure the integrity of the environment and environmental legislation, that citizens be encouraged to report real and legitimate offences to the authorities without fear of reprisal. The Nova Scotia Freedom of Information Act can be used in this respect.

Access to Information

Documentation filed with the Department, excluding confidential business information and personal and other protected information as defined in the new Nova Scotia Freedom of Information Act, should be available for public review.

5. Legislative and Regulatory Action

Recognizing the need for stronger environmental enforcement, a number of provinces have imposed stricter fines and regulatory controls for offenders and have broadened sentencing options available to the courts.

Fines and Penalties

The fine is the most commonly used form of penalty, which, if sufficiently high and strictly enforced, can deter people from repeating or committing an environmental offence.

Some provinces have imposed personal fines for environmental offences which range from a minimum of $500 to a maximum of $100,000 for the first offence and $1000 to $200,000 for the second or more offences. Corporation fines range from a minimum of $1000 to a maximum of $1 million or $2 million. Those who have gained monetarily through illegal environmental activities may be required to pay an additional fine equal to the monetary gain.

Remedies and Deterrents

To strengthen the message that companies and directors are responsible for their actions, several provincial courts have imposed additional requirements over and above regular fines and penalties. For example, directors and companies have been ordered to do community service, to compensate the tax payer for clean-up work, to notify injured parties of the details and facts surrounding an offence, or to publish these facts at their own expense. They may also be required to pay for the cost of the investigation that jailed or fined them.

6. Compensation and Cost Recovery

Private property owners often suffer losses or damages when environmental laws are violated. In most cases these individuals must take separate civil action to obtain any form of compensation for damages.

Cost Recovery

New laws allow the provincial courts to order environmental offenders to pay compensation to any one who has suffered losses or damages. Compensation can be awarded immediately and at the same time as a conviction is given, which spares the victim the cost of launching a separate civil action. In cases in which civil action has started, a breach of a law or regulation is seen by the courts as evidence of nuisance or negligence.

Citizen Injunction

Some provinces have introduced a law to enable the average citizen to apply to the courts for an injunction to stop actions of others that would lead to loss or damage (as defined by law) to their property or to themselves.

7. Intergovernmental Cooperation

Only in the last decade or so have citizens and leaders of many countries begun to understand fully the consequences of human impacts on the environment. Governments have come to realize and acknowledge the integrated nature of environmental and economic growth and the necessity that governments cooperate with one another and coordinate their activities.

Enforcement law in Canada contains a number of provisions to coordinate enforcement activities of all levels of government. Some provinces have expanded their enforcement capability by:

- entering into reciprocal agreements with other governments respecting environmental matters;
- transferring administration and enforcement of their acts to other provincial departments, federal or municipal governments;
- participating in joint environmental hearings or assessments with other provinces or the federal government.

8. Policy to Law

Throughout Canada, the issue of dangerous goods and hazardous wastes has become one of the most difficult and complex matters that governments have had to face. All have developed various policies, legislation, management strategies, and plans to deal with questions of environmental risk assessment, proper handling, storage, and disposal of hazardous wastes.

In the spring of 1991, the government announced a hazardous waste policy concerning the importation of hazardous materials into Nova Scotia for purposes of thermal destruction and disposal. The policy specifically stated that:

- hazardous materials generated outside of Canada cannot be brought into Nova Scotia for disposal or destruction; and
- hazardous wastes from provinces other than the Atlantic Provinces will be accepted only under specific agreements requiring approval of the minister.

The government is now in the process of developing legislation that will allow the implementation of this policy as law.

9. Sustainable Development

The term sustainable development has been defined as "development which ensures that the utilization of resources and the environment today does not impair prospects for their use by future generations." Throughout the world, governments, businesses, industries, and individuals have adopted the concept of sustainable development in the realization that the future of life on our planet depends on our ability to maintain environmental quality as economic development occurs. The principle of sustainable development is reflected in enforcement legislation change that is occurring throughout Canada.

IV CONCLUSION

Environmental law throughout Canada is constantly undergoing revision as a reflection of changes in beliefs and attitudes, and in recognition of the need for effective enforcement mechanisms. The intent of these changes is to assign greater weight to environmental offences, to extend enforcement capability of government departments, to hold offenders accountable for environmental damages and compensation costs, and to make laws more beneficial and accessible to all members of the general public.

We invite you to come forward and comment on environmental enforcement law that has been enacted in other parts of Canada and to provide advice on changes that should be made to ensure that the enforcement law we adopt in Nova Scotia is appropriate for this province.

V ENVIRONMENTAL ENFORCEMENT QUESTIONNAIRE

Please complete the following questionnaire by September 27, 1991 and either mail your response in the enclosed envelope or reply by phone using our toll-free number (1-800-565-6633).

1. What are the characteristics of effective environmental enforcement law? Please rank the following as to their level of importance, on a scale of 1 to 5 with 1 being of highest and 5 lowest importance.

.... fairly and equally applied
.... strictly enforced
.... imposes fines and penalties appropriate to the offence
.... laws are enforced by a team of qualified individuals
.... laws incorporate environmental principles
.... other *(please specify)*

2. Different actions can be taken to protect the environment. Which of the following do you prefer? Please rate from 1 (highest) to 4 (lowest).

.... Government should establish standards and regulations and impose fines for offences.
.... The general public should be encouraged to take responsibility for environmental protection and enhancement themselves.
.... Environmental education programs should be available to all persons to provide the knowledge required to make decisions.
.... Rather that penalizing people who do not meet regulations, we should be rewarding organizations or businesses that exceed environmental requirements.

Do you have any further suggestions of ways to handle the issue? *(Please describe.)*

3. Under what conditions should government have the right to revoke, amend, or appeal previous approvals ?

.... if they pose a detriment to the public interest.
.... if they pose a hazard to public health or safety.
.... if they impair the quality of the environment for any use.
.... under no condition.
.... other *(please specify)*.

4. Do you think that an individual or the Crown should have the right to obtain an injunction to stop or prevent a company or person from taking an action that could cause environmental damage?
Please circle your answer.

yes no not sure

5. Should polluters pay for environmental damages and losses they cause others?

yes no not sure

If no, who should incur the cost of remediation and compensation for damages caused?

6. Do you feel that designating staff of other provincial departments, other governments, and law enforcement agencies will provide a more efficient and effective means of enforcing environmental law?

yes no not sure

Should the Government of Nova Scotia be taking this measure to increase enforcement capability?

yes no not sure

7. Should governments have the authority to charge past landowners, past occupiers (e.g., tenants), and other persons responsible (e.g., generators of the waste) for environmental offences?

yes no not sure

8. Should the Government of Nova Scotia ...

... impose personal fines for environmental offences?

yes no not sure

... impose corporate fines for environmental offences?

yes no not sure

9. Should fines have a set

... minimum limit?

yes no not sure

... maximum limit?

yes no not sure

Should government be imposing fines in addition to regular pollution fines ...

... to those who have gained monetarily through committing an environmental offence?

yes no not sure

... to recover costs of environmental cleanup?

yes no not sure

... to recover costs of compensation for environmental damages?

yes no not sure

10. How may citizens be encouraged to report offences without fear of reprisal?

11. Should directors and employers of companies and businesses be held liable for environmental offences that the company or an employee has committed?

yes no not sure

If yes, do you feel that this will ensure more responsible action by all parties in the future?

yes no not sure

If no, what is your reason for your response?

12. What are some of the things that individuals can do to help Nova Scotia Department of the Environment enforce environmental laws? *(Please mark an "x" beside your answers.)*

.... organize a community environmental watch program

.... inform NSDOE of offences committed or about to be committed

.... be willing to come forward with evidence to present in court

.... be an example to others by abiding by environmental law

.... others *(please list)*

13. Which of the following enforcement provisions do you think would apply to Nova Scotia and should be adopted into law? *(Please mark an "x" beside your answers.)*

.... individual and enforcement agency responsibility to report spills or releases

.... broadened the definition of "responsible party"

.... directors' liability

.... employers' liability

.... delegate authority to issue permits and licenses to other government employees and municipalities

.... designate qualified employees of other government departments and jurisdictions as environmental inspectors or analysts

.... grant government the power to amend, revoke, and appeal permits and licences already granted

.... personal fines

.... broadened types of court remedies and deterrents

.... citizen injunctions

.... citizen compensation

.... establish joint environmental review assessments including hearings with other provinces and the federal government

.... hazardous wastes importation, incineration, and disposal policy

14. Do you have any further suggestions or comments on environmental enforcement practices and law or on any aspect of this discussion paper?